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Denise Juneau
Superintendent

February 27, 2009

[Complainant]

Superintendent ****

THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

RE: **FINAL REPORT:** In the Matter of a Complaint filed by [Complainant], 2008-07,
Alleged Violations of Records Maintenance and Destruction of protected education
records under Individuals With Disabilities Education Act (IDEA) or state law.

Dear [Complainant] and Superintendent ****:

This is the Final Report pertaining to the above-referenced state special education complaint ("Complaint") filed December 12, 2008 pursuant to Admin.R.Mont.10.16.3662.

("Complainant"), alleges that **** School District ("District") failed to provide adequate notice of destruction of **** Special Education records and failed to protect the confidentiality of these records in violation of the Individuals with Disabilities Education Act¹ (IDEA), Montana special education laws and regulation, and the Family Educational Rights and Privacy Act (FERPA).

Specifically, Complainant, a special education assistant for the District, alleges student special education records for the years 1982-83, 1984-85 and 1986-87² were improperly handled or destroyed:

- 1) when the District failed to give proper notice to parents and/or eligible students prior to destruction of certain of these records;
- 2) when unauthorized volunteers and minor students were permitted to access confidential special education records during the destruction process.

A. Procedural History

1. The Complaint. On December 12, 2008, the Montana Office of Public Instruction (OPI) received a signed Complaint from Complainant. Earlier emails had been received regarding the Complaint issues and were incorporated into this Complaint.

¹ The most recent version of the Act is technically entitled: Individuals with Disabilities Education Improvement Act of 2004 published at 20 U.S.C. 1400 et seq. but is referenced here as "IDEA".

² All references are to files from a student's birth year.

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2. Early Assistance Program. The OPI's Early Assistance Program provided a copy of the Complaint to the District and attempted to resolve the controversy pursuant to ARM 10.16.3660. The Director of the Early Assistance Program concluded that resolution was not possible.
3. District's Written Response. On December 16, 2008, the OPI sent a letter to the parties requiring a written response to the Complaint from the District. The District's Response was timely received on December 24, 2008.
4. Complainant's Reply. On December 30, 2008, the OPI sent a letter to Complainant requesting a reply to the District's written Response. Complainant timely filed her Reply on January 6, 2009.
5. Extension of Time In Which To File Final Report. On February 2, 2009, Compliance Officer Harris issued an extension of time in which to file a Final Report to February 27, 2009 due to the need to arrange further interviews with the parties and witnesses.

The Findings and Conclusions contained in this Final Report are based on the Complaint and supporting documents, the District's Written Response and supplements, Complainant's Reply, discussions and interviews with Complainant, **** Special Education Records Secretary and Alternative School Secretary; ****, **** Director of Special Education; ****, former Special Education Executive Secretary and current **** Middle School Secretary; minor Student "A" and minor Student "B," current Alternative High School students engaged by the District to handle the destruction of special education records. An investigator, Pat Boyer, was hired as part of this investigation. As required by federal and state law, all relevant information was reviewed and an independent determination was made as to whether the District violated the IDEA or state law.

B. Legal Framework

Confidentiality and accessibility of student records for all students are generally governed by the provisions of FERPA. *20 U.S.C. §1232g, 34 CFR, part 99*. Special education student records in this State are governed by FERPA but more particularly by the IDEA. *20 U.S.C. §1400, 34 CFR 300.610 through 300.626*. Montana special education records are also governed by State statutes and regulations that incorporate the federal laws and delineate precise treatment of these records within the control of a school district. See *ARM 10.16.3560(1); §20-1-212 MCA; Local Government Retention Schedule 7, XIII-1, Appendix B; §2-6-405 MCA; and ARM 10.55.909*.

The federal Family Policy Compliance Office has jurisdiction over FERPA complaints of accessibility and privacy issues related to student education records. A person may file a complaint regarding an alleged violation under FERPA by writing the Family Policy Compliance Office, U. S. Department of Education, Washington, D.C. 20202-4605 (FERPA 34 CFR 99.60-99.64). The OPI does not process such complaints.

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The OPI has authority to address alleged violations of student record maintenance and destruction pursuant to state provisions related to special education which incorporate the protections of the IDEA and FERPA. *ARM 10.16.3662*. This Complaint proceeds under that authority.

Federal and State law requires school districts to maintain special education records for a minimum of five to eight³ years beyond the date of cessation of special education services or pursuant to parent request when no longer needed by the school. *34 CFR 300.610 to 625; MT Local Government Retention Schedule 7, XIII-1, Appendix B and Appendix C-1*. A school district is required to inform parents when personally identifiable information is no longer needed to provide educational services to the student. *34 CFR §300.624 and ARM 10.16.3560*. At the request of the parents, the information must be destroyed. *Id.* However, a permanent record of a student's enrollment information including name, address, parent or guardian, birth date, academic work completed, level of achievement, immunization records, attendance data, and discipline records must be kept in secure storage. *34 CFR §300.623-.624, §20-1-212 MCA, ARM 10.55.909*.

C. Findings and Conclusions

1. This Office has jurisdiction to investigate these alleged violations of the IDEA and state special education law occurring within one year prior to the filing date of December 12, 2008.
2. Complainant was employed by the school district when this Complaint was filed and had access to confidential school records as a function of her position.⁴
3. The Complainant has standing to file this Complaint under the state special education complaint process at *ARM 10.16.3662(1)*.

1982-1983 Records and Notices

4. The Complaint raised questions as to the disposition of the 1982-1983 special education student records. The District maintained that Notices of intent to destroy were sent in April of 2008.
5. Documentation indicates that Notices were sent in June of 2008. Numerous post-marked envelopes and letters are carefully preserved in binders kept in the Special Education Director's Office (the Director).
6. The 1982-1983 special education records were destroyed properly with adequate 60-day notice.

³ The IEP must be maintained for seven (7) years after the cessation of use by the district if the school received Medicaid reimbursement for services identified in the IEP. *Local Government Retention Schedule 7, Appendix C-1*. Annual service plans are to be retained for eight (8) years. *Local Government Retention Schedule 7, SDR XIII-1 and Appendix B*.

⁴ If no longer employed by the district, personally identifiable information may not be provided to Complainant as part of this process without parental consent. *34 IDELR ¶264 (OSEP 2000)*

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1984-1985 Records and Notices

7. The Complaint alleges student special education records were improperly destroyed for the years 1984 and 1985. The District's Response asserted that these records were not destroyed and that "all records for students with a DOB of 1984 and 1985 are still located in the records room...".
8. The investigation revealed that only a small number of these records were on file at the District. Upon interview, the District indicated it did not know where the other several hundred missing files were. It could not identify anyone who knew the whereabouts of the files it indicated had not been destroyed.⁵
9. The District could not produce a full list of files for this time period.
10. The District produced no Notices or returned envelopes for the 1984-1985 time period.
11. The testimony of the Complainant and of [former Spec. Ed. Ex. Sec.] was that these files had been destroyed without any Notices of intent to destroy being sent or otherwise published.
12. The testimony of the Complainant and [former Spec. Ed. Ex. Sec.] is credible.
13. This investigation concludes that for the 1984-1985 special education records, the District improperly failed to issue Notices of intent to destroy to parents or eligible students and improperly destroyed all but a small number of these files.

1986-1987 Records and Notices

14. The Complaint also asserts that 1986-1987 special education records were improperly destroyed without notice to parents or eligible students.
15. The District asserts that Notices of intent to destroy were sent in September of 2008 for the 1986-1987 records and that any returned envelopes and postmarked letters must be in the possession of Complainant in her capacity as secretary because they are not at the school. No postmarked letters were produced.
16. The District's Response included a printout of a Notice dated September 2, 2008 reportedly sent out for the 1986-1987 records. However, the body of the printout states it is for 1996-1997 records.
17. As of the date of the Complaint, the District had not sought to destroy the still-active the 1996-1997 records.
18. The Director stated that copies of the Notices and parent addresses used to send the Notices were lost as the result of a computer malfunction.
19. Complainant denies that Notices were sent or that she had possession of any returned items. She states she was in a position to send the Notices and to receive returned Notices but none were ever sent or returned during the September through November timeframe.
20. [Former Spec. Ed. Ex. Sec.] supports the assertion that Notices were not sent during the relevant time period. Her testimony on this issue is credible.

⁵ The District closes an estimated 300 to 500 special education record files per year. *Complainant Reply*.

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21. The District produced a list of approximately 80 special education student records that were destroyed for the 1986-1987 school years. The District asserts that all records for those years were destroyed. No 1986-1987 records were produced for inspection. The District had no explanation as to why a full list of destroyed files was not maintained.
22. Complainant's testimony is credible on this issue.
23. This investigation concludes that for the 1986-1987 special education records, the District failed to issue Notices of intent to destroy to parents or eligible students and improperly destroyed these files.
24. The District failed to maintain a complete list of all of the destroyed files.

Volunteer and Student Access to Special Education Records

25. The District utilized various persons to effect destruction of its special education student records. Non-employee "foster grandparents" facilitated the destruction efforts. Three then-current students assisted in the carrying and shredding the records. These individuals had access to private confidential records of individual students.
26. The Complainant stated that these students informed her they recognized names of former students. Upon interviewing two of the students, one admittedly recognized "a name" on the files to be shredded.
27. None of these individuals were trained in the confidentiality requirements required of the District for students with disabilities or otherwise.
28. The District was in violation of its duty to protect the confidentiality of these files from individuals who were not authorized to access the information.

D. Analysis and Conclusions of Law

Issue I: Did the District violate State special education provisions pertinent to the IDEA or FERPA by destroying certain records without proper notice to parents or eligible students?

Conclusion: For the 1982 and 1983 period, the District properly sent Notices that the special education records containing personally identifiable information would soon be destroyed.

Conclusion: For the periods 1984-1985 and 1986-1987, the District improperly destroyed special education records by failing to provide notice to parents or eligible students prior to destruction of these records.

School districts are required to comply with state and federal records maintenance, retention, and destruction laws and regulations. As a routine part of a district's responsibilities, each district must review its files pursuant to district policy, and state and federal law and regulations that

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protect various rights governing student information and records. Many districts opt to destroy student information and records after a designated period of time. Other districts store records indefinitely. This case arose when the District sought to destroy inactive special education records of students born between 1982 and 1987.

The School District's policy provides that "Cumulative records which may be of continued assistance to a student with disabilities who graduates or permanently withdraws from the District, may, after five (5) years, be transferred to the parents or to the student if the student has succeeded to the rights of the parents. *School District #1 Policies, 3600P Student Records Maintenance of School Student Records, p.1.*

This policy is in keeping with the Montana regulation which mandates that special education records and confidentiality of information must follow the provisions of FERPA and its implementing regulations at 34 CFR, part 99, and must follow the provisions established for special education under the IDEA and its implementing regulations at 34 CFR 300.610 through 300.626. *ARM 10.16.3560.*

FERPA does not directly address the retention or destruction of education records. *See 34 CFR §300.610.*⁶ Instead, other federal laws, state and local laws and policy are determinative including but not limited to the IDEA, GEPA⁷, Board of Public Education rules, Montana School Accreditation Standards and Procedures Manual; MT Local Government Retention and Disposition Schedule.

For special education records, the IDEA delineates specific actions a district must take at the various stages of records management to safeguard the confidentiality of personally identifiable information. *34 CFR § 300.623.* A school must protect the confidentiality of personally identifiable information at collection, storage disclosure, and destruction stages. *34 CFR § 300.623 (a).*

When it comes time to destroy records, Section 34 CFR 300.624 requires the following:

- "a) The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.
- b) The information must be destroyed at the request of the parents. However, a permanent record of the student's name, address, and phone number, his or her grades, attendance

⁶ 300.610 Confidentiality. The Secretary takes appropriate action, in accordance with section 444 of GEPA, to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by SEAs and LEAs pursuant to Part B of the Act, and consistent with 300.611 through 300.627.

⁷ GEPA is the General Education Provisions Act which delineates records retention requirements for documentation related to auditing and monitoring of grants to Department of Education federal financial assistance recipients.

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record, classes attended, grade level completed, and year completed may be maintained without time limitation." (see also 20 USC 1412(a)(8); -1447(c)).

Montana statute incorporates these IDEA provisions at ARM 10.16.3560. Destruction of records is more specifically delineated in §20-1-212, MCA:

Destruction of records by school officer.

- (1) Upon the order of the board of trustees, a school officer may destroy records that have met the retention period, as contained in the local government records retention and disposition schedules..."
- (2) Student records⁸ must be permanently kept, and employment records must be kept for 10 years after termination.

The applicable schedule referenced above is the Local Government Records Retention Schedule found in Schedule 7 of the School District Records Schedule published by the Montana Local Government Records Committee.⁹ It suggests destruction of special education records five years from the end of the student's special education services, or per parent request when no longer needed by the school.¹⁰ See *SDR XIII-1*.

1982-1983 Special Education Records

In this case, all of the records at issue had been retained longer than the required five years for inactive files.¹¹ Lengthy retention does not violate IDEA. The District was in the process of destroying old records. For the 1982 and 1983 period, the District properly sent Notices that the records containing personally identifiable information would soon be destroyed and copies were available to the recipients.

It should be noted that during the investigation it is unclear whether the 1982-1983 Notices were sent to parents or the students who, by this time, had long since reached the age of majority. Because rights regarding educational records are transferred to a student at age 18 pursuant to 34 CFR 300.625(c), notices must be sent to the students whose files were to be destroyed. Also of note during this investigation, inquiry was made as to whether other effective notice methods are available. The MT Local Government Records Committee Schedule 7 School District Records Schedule suggests publishing an informative news release which would reach the targeted audience. See *SDR Appendix B, B-1*.

⁸ Student records are defined as the student's permanent school file under ARM 10.55.909.

⁹ The OPI also publishes on its website the Montana School Accreditation Standards and Procedures Manual, Appendix C, which reiterates these standards for the convenience of the school districts of the State.

¹⁰ The MT Local Government Records Committee Schedule 7 School District Records Schedule at SDR XIII-1 also gives an eight year retention schedule for annual plans of services.

¹¹ This report does not address any requirements a district may have to transfer any historic documents over 10 years old to the Montana State Archives pursuant to §2-6-405, MCA.

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Some of the 1982-1983 "sent Notices" were returned and the investigation revealed that these envelopes and letters were carefully stored in the Director's office. The District demonstrated that proper notice had been made for the 1982-1983 files.

1984-1985 Special Education Records

With regard to the 1984-1985 special education records, the District asserted those records had not been destroyed. Upon investigation, a small number of the 1984-1985 records were located. However, the remaining majority of records for this time period could not be accounted for in any manner. The District could not produce a full list of these files.

The Complainant and another witness stated that these records were destroyed without notice to parents or students. Further, unlike the postmarked envelopes and returned letters that were carefully preserved in the Director's office for 1982-1983 records, no envelopes, no letters, no computer copies of Notices, and no newspaper notices existed for the 1984-1985 school year-ostensibly because the records were not destroyed. Upon ample opportunity to produce the records, the District could not account for their disappearance, could not produce any further files, and could not produce a list of these files. This investigation concludes the 1984-1985 records were destroyed without proper notice to parents or eligible students and proper records were not maintained in violation of Section 34 CFR 300.624 and ARM 10.16.3560 and supporting statutes.

1986-1987 Special Education Records

With regard to the 1986-1987 special education records, the Complaint asserts these records were destroyed without prior notice being effected. No records for this time period were in the possession of the District and there was no disagreement that these records had been destroyed. However, the District produced a list of destroyed files which contained only eighty student records. While it is agreed that there were significantly more than eighty files for these years (several hundred each year), the District had no explanation as to why the list did not reference all of the files destroyed. Upon inquiry, the District was unable to produce a complete list of the destroyed files.

In addition to the faulty lists, the issue on these records again is Notice. The District argues it sent proper Notices and the Notices are in the possession of Complainant, not the District. It also asserts that copies of the Notices do not exist as they must have been lost due to a computer malfunction. In addition, the District produced a computer Notice dated September 2, 2008 but the body of the Notice stated it was for 1996-1997 files-files that are still active. Upon investigation, Complainant denied possession of any returned Notices stating they were never sent or published in the newspaper nor were they posted on the District's website as had also been discussed with the Director. [Former Spec. Ed. Ex. Sec.] credibly supports Complainant's assertions. Both were in a position to know whether or not Notices went out during the relevant time period. Unlike the 1982-1983 postmarked envelopes and returned letters carefully preserved in the Director's office, the District produced a faulty September Notice but no envelopes, letters, website notices, newspaper notices, or fiscal invoices to verify that notices had actually been sent.

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This investigation concludes the 1986-1987 records were destroyed without proper notice to parents or eligible students in violation of Section 34 CFR 300.624 and ARM 10.16.3560 and supporting statutes. Further the District failed to keep an adequate permanent list of the destroyed records in violation of §20-1-212, MCA and ARM 10.55.909, and 34 CFR §300.624.

Issue 2: Did the District violate confidentiality provisions when it permitted students and non-employee foster grandparents to handle and shred special education records?

Conclusion: The District violated its duty to protect the confidentiality of these files during this destruction process by the failure to ensure proper training and through the use of minor students.

The Complaint alleges several adult "foster grandparents" and students were improperly permitted to handle the files for destruction. This investigation revealed the District did utilize various non-employee individuals to effect destruction of its special education student records. One or two non-employee "foster grandparents" facilitated the destruction efforts. Three then-current students assisted by carrying and shredding the records. These individuals had access to private confidential records of individual students. The Complainant stated these students told her they recognized various names of former students. Upon interviewing the students, one admittedly recognized "a name" on the files to be shredded.

All educational records collected and maintained by a school shall be kept in a confidential manner according to the implementing regulations of FERPA at 34 CFR part 99. See *ARM 10.55.909(2)*. FERPA governs the accessibility and privacy of student education records at educational institutions. FERPA regulation §99.31 provides that "a contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official...provided that the outside party...

- 1) performs an institutional service or function for which the agency or institution would otherwise use employees;
- 2) is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
- 3) is subject to the requirements of §99.33(a) governing the use and re-disclosure of personally identifiable information from education records.

It appears the adult volunteers utilized by the District may qualify as acceptable substitutes for District personnel under sections 1 and 2 above if they are trained on re-disclosure as required in section 3. All individuals utilized by the District would also need to meet the IDEA requirements referenced in FERPA for treatment of special education records which require all persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Section 300.123 and 34 CFR part 99. See *34 CFR §300.623(c)*.

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Verbal admonishments not to divulge information, as occurred here, are insufficient. The adult volunteers were not adequately trained in the confidentiality requirements of the District for students with disabilities as required. Nor were the minor students who were utilized for this task. This Officer can find no support for the fact that use of minor students is countenanced or contemplated under FERPA for handling confidential records of fellow students.¹² For its failure to train and for the use of minor students in this destruction of confidential information, the District is found to have violated its duty to protect the confidentiality of these files during the destruction process pursuant to ARM 10.55.909 and 34 CFR §300.623(c).

E. Disposition and Order

This Complaint is affirmed as discussed above. The following corrective actions are ordered:

1. The District is ORDERED to develop specific policies and procedures for the maintenance, notification of parents and eligible students, and destruction of special education records within sixty days of the date of this Order.
2. The District is ORDERED to provide adequate training to all special education staff, including administrators and clerical, charged with the responsibility for the maintenance, notice, and destruction of student records to ensure compliance with its' policies, this Report, and applicable laws. Training must be scheduled to be a continual process when new and replacement staff are hired. Initial training must be completed within sixty days of the date of this Order.
3. The District is ORDERED to dedicate sufficient time to the maintenance and destruction of the Special Education records.
4. The District is ORDERED to report to this Officer within ninety days of this Order as to actions taken to comply with this Order.

Dated this ____ day of February, 2009.

Tim Harris, Compliance Officer
Montana Office of Public Instruction

¹² Further the District has additional responsibilities in this regard. The District is required to assure that one official at each agency will assume responsibility for ensuring the confidentiality of any personally identifiable information. 34 CFR § 300.623(b). In addition, each agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information. 34 CFR § 300.623(d).